

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON J. PAYNE, ) No. C 07-4712 JSW (PR)  
Petitioner, )  
vs. )  
JOE MCGRATH, Warden, ) **ORDER DENYING MOTION TO  
DISMISS, GRANTING MOTION TO  
AMEND PETITION AND  
REINSTATING ORDER TO SHOW  
CAUSE**  
Respondent. )  
\_\_\_\_\_) (Docket No. 8)

Petitioner, a prisoner of the State of California has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254. On June 12, 2008, Respondent filed a motion to dismiss the petition for failure to completely exhaust the claims in the petition before the Court (docket no. 8). Respondent argued that because the petition was not completely exhausted, Petitioner had the option of dismissing the instant petition and returning to state court to exhaust the unexhausted claim, amending the petition to delete the unexhausted claim, or, if he can show good cause for failure to exhaust the claim and that it is potentially meritorious under *Rhines v. Weber*, 544 U.S. 249 (2005), he can move for a stay of the petition while he exhausts the claim in the state courts.

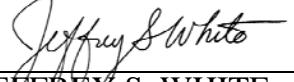
In Petitioner’s opposition to the motion, he concedes that *Brady* claim, claim four in the Court’s order to show cause is unexhausted and requests the Court to amend the petition to delete that claim and allow the petition to proceed without the unexhausted claim. Therefore, Respondent’s motion to dismiss the petition is DENIED (docket no. 8) and Petitioner’s motion to amend the petition to delete claim four is GRANTED (docket

1 no. 12). Therefore, the Court's order to show cause, filed on January 29, 2008 is now  
2 reinstated as to the first three claims.

3 Respondent shall file with the Court and serve on Petitioner, within **sixty (60)** days  
4 of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
5 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
6 granted. Respondent shall file with the answer and serve on Petitioner a copy of all  
7 portions of the state trial record that have been transcribed previously and that are relevant  
8 to a determination of the issues presented by the petition. If Petitioner wishes to respond  
9 to the answer, he shall do so by filing a traverse with the Court and serving it on  
10 Respondent within **thirty (30)** days of his receipt of the answer.

11 IT IS SO ORDERED.

12 DATED: February 12, 2009

  
13 JEFFREY S. WHITE  
14 United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JASON PAYNE,

Case Number: CV07-04712 JSW

Plaintiff,

## **CERTIFICATE OF SERVICE**

V.

JOE MCGRATH et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 12, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jason J. Payne  
V26575  
CSP Solano  
P.O. Box 4000  
Vacaville, CA 95696

Dated: February 12, 2009

*Jennifer Ottolini*  
Richard W. Wiking, Clerk  
By: Jennifer Ottolini, Deputy Clerk

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